Supreme Court U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

HOWARD P. JOHNSON and IRIS JOHNSON, TRUSTEES,
Petitioners,

v.

D.H. BLAIR & CO., INC. and NAFTALI FEIGENBAUM,
Respondents.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida, Fourth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an agreement to arbitrate involves interstate commerce, section 2 of the Federal Arbitration Act, 9 U.S.C. §2, makes written agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The question presented for review is whether section 2 preempts a state law that makes agreements to arbitrate the issue of entitlement to attorney's fees, but not other agreements, unenforceable unless the parties "expressly waive" their statutory right under state law to have a court determine entitlement to attorney's fees?

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LIST OF ALL PARTIES

All parties appear in the caption of the case on the cover page.

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In Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

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PETITION FOR A WRIT OF CERTIORARI

Howard P. Johnson and Iris Johnson, Trustees, respectfully request that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Fourth District, in this case.

CITATIONS TO RELEVANT OPINIONS AND ORDERS BELOW

The opinion of the District Court of Appeal of Florida, Fourth District is located at Appendix 1 – 7 to this petition, (hereafter "App."). It is reported at 697 So. 2d. 912 (Fla. App. 4th Dist., 1997). The Order of the Supreme Court of Florida granting discretionary review is

located at App. 8 & 9 and is reported at 703 So. 2d 476 (Fla. 1997); the Order dismissing review as improvidently granted is located at App. 10 & 11 and is not reported. The Order of the Seventeenth Judicial Circuit Court of Florida confirming the arbitration award is located at App. 12 - 15 and is not reported. The Order of the District Court of Appeal of Florida, Fourth District, denying rehearing and rehearing en banc is located at App. 16 &17.

JURISDICTION

The District Court of Appeal of Florida, Fourth District, entered its judgment on July 23, 1997. The District Court of Appeal denied a timely petition for rehearing on August 27, 1997. On November 16, 1998 the Supreme Court of Florida entered its order denying discretionary review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. §2, provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a

> transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any party thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 682.11 Florida Statutes provides:

> Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpire's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

STATEMENT

A. Introduction

This case arises from the refusal of the District Court of Appeal of Florida, Fourth District ("Fourth District"), to enforce an agreement by the parties to arbitrate their disputes. The agreement met all of the requirements of section 2 of the Federal Arbitration Act ("FAA") , 9 U.S.C. § 2. That statute makes arbitration agreements involving interstate commerce "valid, irrevocable, and enforceable, save upon

such grounds as exist at law or in equity for the revocation of any contract." The Fourth District, relying on Florida law , reversed the trial court's decision that confirmed the arbitration award under the FAA. The Fourth District ruled that the agreement was unenforceable because it did not comply with §682.11 Fla. Stat. which precludes arbitrators from deciding the issue of entitlement to counsel fees unless the parties expressly waive their right to have the Court decide the issue. In so doing, the court failed or refused to consider Petitioners' argument, though it was timely presented, that the Florida statute, which applies only to agreements to arbitrate attorney's fee issues and not other agreements, is preempted by section 2 of the FAA.

B. Factual Background

In 1992, Petitioners, Howard and Iris Johnson, Trustees ("Petitioners"), signed a cash account agreement with the securities firm – Respondent, D. H. Blair & Co. Inc. ("Respondent"). App. 1. The agreement contained an express arbitration clause providing that "all controversies or disputes ... of any kind shall be settled by arbitration ... before ... the National Association of Securities Dealers ["NASD"] ... in accordance with the Rules of such organization then

obtaining." Record on Appeal 79 (hereafter "R.").

Petitioners' account statements show that: (1) Petitioners were Florida residents; (2) Respondent was located in New York; and (3) Respondent bought and sold securities in Petitioners' account including the securities of Somanetics Corporation. R. 119–137. According to its Annual Report, Somanetics is a Michigan corporation and Somanetics securities were traded on the NASDAQ stock market, R. 162–200, which is a facility of interstate commerce.[1] The parties' dispute arises from the unauthorized purchase and sale of Somanetics securities in Petitioners' account. R. 82–86.

C. Proceedings Below

A dispute subsequently arose between the parties. In 1994, Petitioners commenced arbitration proceedings at NASD against Blair and one of its brokers. The parties each submitted a post dispute

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[1] "Nasdaq is an electronic securities market comprised of competing market makers whose trading is supported by a communications network linking them to quotation dissemination, trade reporting and order execution systems." NASD Manual, Rule 4200 (27). Definitions (April, 1998); http://www.nasdr.com

Uniform Submission Agreement which provided that "the undersigned party hereby submits the present matter in controversy, as set forth in the attached statement of claim, answers ... all related counterclaims ... to arbitration." See R. 7–9. In the referenced pleadings, both parties sought a determination of entitlement to attorney's fees. App. 2; R. 116 & 160. Since the parties' Uniform Submission Agreement specifically incorporated Petitioners' statement of claim, Respondent's answers and the counterclaims, and because each party requested entitlement to attorney's fees, under the FAA the parties submitted the entitlement issue to NASD arbitration. Thus, the arbitrators were authorized by contract to determine Petitioners' entitlement to attorney's fees. The agreement also provided that each party agreed "to abide by and perform any award(s) rendered pursuant to this Submission Agreement ...." R. 7–9. On February 21, 1995 the arbitrators found Blair jointly and severally liable "for violation of section 517.301 Florida Statutes" (statutory fraud) and "that Blair shall pay the attorney's fees of the claimants in an amount that shall be determined by a court of competent jurisdiction." R. 13–16.

1. The Fourth District's Judgment

The Fourth District "... reverse[d] the trial court's confirmation

of the arbitrators' award of attorney's fees, with leave to the trial court to reinstate the amount of its award of attorney's fees ... upon a determination of appellees' entitlement to such fees." App. 7. The Fourth District refused to enforce the parties' agreements to arbitrate because it did not comply with the limitation contained in section 682.11 Fla. Stat. for arbitrating attorney's fees which is applicable only to arbitration agreements. App. 4. That statute provides that "unless otherwise provided in the agreement or provision for arbitration ... expenses and fees ... not including counsel fees ... shall be paid as provided in the award." Section 682.11 Fla. Stat. The statute, by its terms and as interpreted by the Fourth District, affects the enforceability of arbitration agreements but not other types of contracts.

The decision of the Fourth District, not to enforce the parties' agreement to arbitrate an attorney's fee issue, fails or refuses to pass on the federal questions presented by Petitioners – that the FAA governs the arbitration; that the FAA preempts state arbitration laws that require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration; and that the arbitration agreements are enforceable.

At the Fourth District, Respondent conceded that "[t]he parties appear to be in agreement that federal arbitration law controls. (R:299)." Respondent's Initial Brief, p. 20, fn. 38. Instead, relying on section 682.11 Fla. Stat., it ruled that "... the arbitration panel did not have authority under Florida law to award fees." App. 3. The Fourth District relied on the Florida Supreme Court for the proposition that, under Florida law, " ... an arbitrator has no authority to award attorney's fees absent an express waiver of the limitations contained in section 682.11, Florida Statutes (1993)." App. 4.

The Fourth District found that "... both parties sought attorney's fees... " and that by their execution of the NASD submission agreement they agreed to "... abide by any arbitration award," App. 2, and to submit "all controversies" to arbitration. App. 5. However, the court reasoned that "[w]hile we find appellees' argument persuasive, we conclude that the supreme court has expressly limited its holding that the parties may voluntarily agree to submit an attorney's fee issue to an arbitration panel to an express agreement." App. 5. The Fourth District held that "... the parties' actions did not constitute an express waiver of their right to have the court decide the issue of attorney's fees." App. 6.

The decision of the Fourth District conflicts with prior decisions of this Court holding that state laws that require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration are preempted by 9 U.S.C. §2.

2. How the Federal Questions were Presented

Petitioners raised the federal questions in the state trial court at the first opportunity. On March 27, 1995, in the original pleading, Petitioners moved to confirm the arbitration award in the Seventeenth Judicial Circuit Court in Florida "pursuant to section 9 of the Federal Arbitration Act, 9 U.S.C. §9," not under Florida law. R. 1–6.

Prior to oral argument on Petitioners' motion to confirm and Respondent's motion to vacate, Petitioners raised the federal question again before the state trial court in Petitioners' Memorandum of Law in Opposition to Motion to Vacate and in Support of Motion to Confirm, pp. 1, 3- 4, 8-10 & 14-17. (R. 277-419). Petitioners argued that the FAA governs the proceedings and that the FAA preempts state arbitration laws that require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. The parties agreements to arbitrate including the uniform submission agreements submitting the issue of entitlement to attorney's fees to

NASD arbitration were enforceable. The following are quotations from the presentation of the federal question to the state trial court:

> "This arbitration proceeding is governed by the Federal Arbitration Act ("FAA") as the securities transactions underlying the disputes between the parties and the parties' agreements evidence interstate commerce, 9 U.S.C. § 2; Allied Bruce Terminix Companies, Inc., v. Dobson, 513 U.S.___ slip op., 115 S. Ct. 834, ...," Id. at p. 1; that "... to the extent the Florida Arbitration Code is contended to be inconsistent with the FAA, the FAA would control. Southland, infra., Mastrobuono, infra. and Allied Bruce, supra. " Ibid.; that "... the FAA preempts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. Volt Info. Sciences v. Bd.. of Trustees, 109 S. Ct. 1248, 1255 (1989) citing, Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S. Ct. 852, 858 (1984);" Id. at 4; and that "if the contracting parties agree to include a claim within the issues to be arbitrated, 'the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.' Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. ___, slip op., 115 S. Ct. 1212, 1216 ... (1995)." Id. at 17. R. 277-419.

On August 25, 1995 the state trial court confirmed the NASD

Arbitration Award "in all respects" and ordered that Petitioners "shall recover from Respondent ... their reasonable attorney's fees and costs pursuant to the arbitration award." App. 12–15.

On January 12, 1996 the state trial court entered its judgment setting an amount for Petitioners' attorney's fees.

At the state appellate level, Petitioners were the Appellees. Petitioners presented the federal questions to the Fourth District at the first opportunity in Petitioners' Answer Brief, at pp. 19-23, 28-9 and subsequently in Petitioners' motion for rehearing and motion for rehearing en banc at p. 2.

Petitioners presented the federal questions to the Supreme Court of Florida in Petitioners' Amended Jurisdictional Brief pp. 4-7, when Petitioners sought discretionary review. On December 26, 1997 the Florida Supreme Court "accepted jurisdiction." Petitioners presented the federal question to the Supreme Court of Florida again in Petitioners' Initial Brief, at pp. 12-14 and Reply Brief, at pp. 1-6. On November 16, 1998 the Florida Supreme Court decided that it "is without jurisdiction and, therefore, the Petition for Review is discharged as improvidently granted." App. 10-11.

REASONS FOR GRANTING THE WRIT

The decision of the Fourth District conflicts with decisions of this Court and it also conflicts with decisions by the Federal Court of Appeals for the Second and Eleventh Circuits on the same issues. At the state level conflicting decisions are proliferating and the need for guidance is acute. See 60 A.L.R. 5th 669 (1998). This case is a timely and rare opportunity to provide that guidance. Moreover, the decision below is erroneous as the parties' agreement to arbitrate entitlement to attorney's fees is enforceable and the state limitation for arbitrating attorney's fees is preempted by the FAA. The issue raised by the decision below is important.

This case presents an important issue regarding the scope of section 2 of the Federal Arbitration Act, 9 U.S.C. §2. That section provides that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Fourth District refused to enforce the agreement here because it did not comply with a state statute requiring that an agreement to arbitrate attorney's fees (but no other contractual term) include an express waiver by the parties of their right under state law to have a court determine their entitlement to attorney's fees.

The decision of the Florida District Court of Appeal is in direct conflict with decisions of this Court and the Second and Eleventh Circuits.

The decision of the Fourth District failed or refused to consider the controlling federal question: whether Florida's express waiver requirements for arbitrating attorney's fees are preempted by section 2 of the FAA. The Fourth District's decision conflicts with the language of section 2 and with the decisions of this Court construing that language. Section 2 plainly states that written arbitration agreements involving interstate commerce are to be enforced "save upon such grounds as exist . . . for the revocation of any contract." 9 U.S.C.§2. This Court has repeatedly read that language -- most recently in Doctor's Associates, Inc. v. Casarotto, __ U.S. __, 116 S.Ct. 1652 (1996) -- to mean that state laws that condition enforcement of arbitration agreements on compliance with particular state requirements are preempted unless they apply to enforcement of contract provisions generally and not just to arbitration provisions. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 55; 115 S.Ct. 1212, 1215 (1995); Allied-Bruce Terminix Companies v. Dobson, 513 U.S. 265; 115 S. Ct. 834 (1995); Perry v. Thomas, 482 U.S. 483 (1987); Southland Corp. v. Keating, 465 U.S. 1 (1984);

Moses H. Cone Memorial Hosp. v. Mercury Contr. Co., 460 U.S. 1 (1983). "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." Southland Corp. v. Keating, 465 U.S. 1, 12, 104 S. Ct. 852, 858-59 (1984).

In deciding that Florida's statutory limitations for arbitrating attorney's fees controlled the parties' agreement to arbitrate, the state appellate court declined to follow a contrary decision from a federal court of appeal which held that an "all controversies" clause in an arbitration agreement was broad enough to include an attorney's fee issue. The Second Circuit reasoned that since "the agreement provides that any and all controversies shall be submitted to arbitration; there is no express limitation with respect to attorney's fees," and that "... a choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including the right to arbitrate claims for attorney's fees." PaineWebber v. Bybyk, 81 F. 3rd 1193, 1202 (2nd Cir. 1996).

The state appellate court decision also conflicts with a decision of the Eleventh Circuit regarding the submission of an attorney's fee

issue to NASD arbitration. The Eleventh Circuit held that "... both parties sought an award of their fees without a jurisdictional objection from the other, the issue of who should get fees ... was effectively submitted by agreement of the parties." Marshall & Co., Inc. v. Duke, 114 F. 3d 1988, 1990 (11th Cir. 1997), cert. denied __ U.S. __, 118 S. Ct. 1043 (1998). The Fourth District found that "both parties sought attorney's fees in their claims and counterclaims and that by their execution of the NASD submission agreement, they agreed that 'all controversies or disputes between us of any kind shall be settled by arbitration." App. 2 & 5. On the same facts, the Fourth District held that "... the parties actions did not constitute an express waiver of their right to have the Court decide the issue of attorney's fees." App. 3 & 6. The record does not show that Respondent made a jurisdictional objection to the parties' submission agreement to arbitrate entitlement to attorney's fees in NASD arbitration. Respondent merely contested Petitioners' entitlement to fees on the merits.

The Second and Eleventh Circuits relied on the language of section 2 and the decisions of this Court construing that language to hold that section 2 preempts state laws conditioning enforcement of arbitration agreements on state restrictions applicable only to

agreements to arbitrate. The decision of the Fourth District failed or refused to consider the controlling federal question even though it was timely presented to them.

The FAA preempts Florida's express waiver requirements for arbitrating an attorney fee issue.

The dispute between the parties arises from the sale of securities in a national securities market, an interstate facility, between residents of two different states. The parties' arbitration agreements are contracts evidencing transactions involving interstate commerce — the purchase and sale of securities between states — and are, therefore, governed by the FAA, 9 U.S.C. § 2. Respondent conceded, in its initial brief to the Fourth District, that "the parties appear to be in agreement that federal arbitration law controls." (Initial Brief in Fourth District , p. 29, fn. 38).

The terms of the parties' arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (Emphasis added). FAA, 9 U.S.C. §2; Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)("Section 2 mandates the enforcement of arbitration agreements ..."). Under the FAA, parties may agree to arbitrate "all controversies"

which includes attorney's fees, even when state law prohibits arbitrators from deciding the issue. Paine Webber Inc. v. Bybyk, 81 F.3d 1193, 1199 (Second Cir. 1997); See, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56-58 (1995).

"Courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions .... By enacting §2 ... Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." Doctor's Associates v. Casarotto, ___U.S___, 116 S. Ct.1652 (1996). In this case, the Fourth District's decision holds that arbitrability of attorney's fee issues is subject to a heightened standard under Turnberry's "express waiver" requirement, which is akin to the state of Montana's "conspicuousness" requirement for arbitrability that was invalidated by this Court, pursuant to FAA, 9 U.S.C. §2 in Doctor's Associates, supra.

The Fourth District's decision directly conflicts with FAA, 9 U.S.C. §2 because §682.11 Fla. Stat. conditions the enforceability of agreements to arbitrate attorney's fees on compliance with a special, **express waiver** requirement not applicable to contracts generally. Ibid. The Fourth District used Florida's express waiver requirement to

invalidate the parties' agreement to arbitrate attorney's fees. Section 682.11 Fla. Stat. places arbitration agreements, regarding attorney's fees, in a class apart from "any contract," and singularly limits their validity. The FAA thus preempts the Florida statute with respect to arbitration agreements regarding attorney's fees when, as here, the arbitration agreement is governed by the FAA. Ibid. "See 2 I. Macneil, R. Speidel, T. Stipanowich, & G. Shell, Federal Arbitration Law §19.1.1, pp. 19:4-19:5 (1995) (under Southland and Perry, 'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted')." Ibid.

Under the FAA, 9 U.S.C. §§ 1 & 2, the parties' agreement to arbitrate "all controversies" and the parties' post dispute submission agreement to arbitrate entitlement to attorney's fees are enforceable, even when they are inconsistent with a state law prohibiting arbitrators from deciding attorney's fees. Paine Webber Inc. v. Bybyk, 81 F.3d 1193, 1202 (Second Cir. 1997). A state court may not use a state law that only applies to arbitration agreements to invalidate any portion of an arbitration agreement. Further, a state court may not require a judicial forum to resolve an issue that the parties agreed to submit to arbitration. The Fourth District has misapplied §682.11 Fla. Stat. to an

arbitration agreement between a Florida customer and a New York securities firm that clearly involves interstate commerce, and, consequently, is governed by the FAA not the Florida Arbitration Code. FAA, 9 U.S.C. §§ 1 & 2; See Doctor's Associates v. Casarotto, __U.S__., 116 S. Ct.1652 (1996).

The Florida District Court of Appeal's Decision raises issues of national importance.

Finally, the issues presented here have importance beyond this case. Thirty four states in addition to Florida have enacted arbitration laws with attorney's fee restrictions comparable to those in Florida that only apply to an arbitration provision in a contract. Uniform State Laws Annotated, Uniform Arbitration Act Refs. & Annos: 4 Am Jurisprudence 2d, Alternative Dispute Resolution §28. More generally, numerous states have placed conditions on agreements to arbitrate entitlement to attorney's fees that do not apply to other contracts. Taken collectively, these state laws stand as a direct impediment to the national uniformity contemplated by section 2, leaving persons transacting business in multiple states, like securities investors, subject to the vagaries of inconsistent state arbitration laws. Review by this Court is thus necessary to implement Congress' "inten[t] to

foreclose state legislative attempts to undercut the enforceablity of arbitration agreements." Southland, 465 U.S. at 16.

The NASD uniform submission agreement specifically incorporates the parties' pleadings into the submission agreement to identify the issues that the parties are submitting to NASD arbitration. The District Court of Appeal's decision disrupts NASD arbitration by invalidating the NASD procedure used by all parties to define the specific issues that the parties are submitting to NASD arbitration including attorney's fees. While there are no state limitations on other issues, under the District Court of Appeals decision an agreement to arbitrate entitlement to attorney's fees may not be submitted to NASD arbitration in the same form as other issues – reflecting an anti-arbitration policy. According to the state appellate court, agreements to arbitrate attorney's fees are not enforceable unless the parties expressly waive their state right to have the court determine entitlement. The Fourth District decision requires a judicial forum for an issue the parties agreed to arbitrate.

The Fourth District decision is an example of the confusion in the court system relating to the application of the federal versus state arbitration codes to NASD securities arbitrations. This case provides

this Court with an important opportunity to clarify the confusion and thereby prevent a barrage of complex and time consuming lawsuits and appeals regarding these issues.

The Fourth District decision interferes with NASD arbitration, and the parties' agreements to arbitrate, by declaring that the parties' agreements to submit the attorney's fee issue to the arbitrators, under NASD rules, will not be enforced under state law. This is a serious conflict. According to published NASD Regulation statistics, in 1994, 5,570 claims were filed for NASD arbitration, 6,056 in 1995, 5,631 in 1996 and 5,997 in 1997. See http://www.nasdr.com/2380.htm. Since parties routinely submit attorney's fee issues to NASD arbitration, the potential impact of the Fourth District's refusal to enforce the NASD submission agreement is substantial.

By their tactics, the securities firm has compelled elderly victims of securities fraud to endure a high cost, time consuming process to obtain and confirm their arbitration award. The decision of the Fourth District prolongs this ordeal by partially setting aside the arbitrators' award and ordering the trial court to conduct still more proceedings, where the trial court is expected to substitute its judgment for that of the arbitrators. The Fourth District's decision has

also created a disincentive to attorneys, discouraging them from taking the cases of defrauded investors on a contingent basis for fear of inadequate compensation.

A definitive decision by this Court, explaining the relationship between the Federal and State arbitration statutes, will protect future victims of securities fraud from having to run a legal gauntlet to obtain and confirm an arbitration award, as well as encouraging attorneys to vindicate the rights of securities fraud victims.

If the decision of the District Court stands, it will signal state courts that they can evade the Federal Arbitration Act by failing or refusing to pass on the federal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 12, 1999

APPENDIX

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

Nos. 95-3368, 96-0290

D.H. BLAIR & CO., INC.,

Appellant,

v.

HOWARD P. JOHNSON and IRIS JOHNSON, TRUSTEES, and NAFTALI FEIGENBAUM,

Appellees.

Argued July 23, 1997
August 27, 1997, Decided

Before DELL, J. District judge.

D.H. Blair & Co., Inc. appeals from an award of attorney's fees entered after a National Association of Securities Dealers (NASD) arbitration award in favor of Howard and Iris Johnson ("appellees").

In 1992, appellees signed a cash account agreement with the securities firm of D.H. Blair & Co., Inc. ("appellant"). Pursuant to the agreement, all controversies were to be settled by arbitration. Two years later, appellees commenced arbitration proceedings against appellant and one of its brokers. Appellees claimed that appellant

violated the Florida Civil Theft Statute, section 812.014, and the Florida Securities and Investor Protection Act, section 517.301, Florida Statutes (1993). Appellant denied wrongdoing and counterclaimed against appellees. Both parties sought attorney's fees and costs in their respective claims and counterclaim. Each party executed an NASD uniform submission agreement stating that the parties would abide by any arbitration award.

The arbitrators found that appellant violated section 517.301, Florida Statutes, and awarded appellees $32,278.83. The arbitrators also awarded appellees attorney's fees in an amount to be determined by a court of competent jurisdiction. Appellees filed an action to confirm the arbitration award and set the amount of attorney's fees. Appellant moved to vacate the arbitration award claiming that the arbitrators exceeded their powers in determining appellees' entitlement to fees. The trial court confirmed the arbitration award and awarded appellees attorney's fees for the arbitration proceeding and for attorney's fees incurred after the award. The trial court awarded attorney's fees for Mark Tepper in the amount of $269,464.00 and for Jeffrey M. Weissman in the amount of $29,655.50.

Appellant contends that the arbitrators exceeded their authority

when they awarded attorney's fees. Further, appellant asserts that the trial court erred in awarding appellees attorney's fees for post-arbitration representation and for the work performed by Jeffrey Weissman. Appellant also contends that the amount of the attorney's fees award is excessive.

We agree with appellant's argument that the arbitration panel did not have authority under Florida law to award fees[1].

In *Turnberry Associates v. Service Station Aid, Inc.*, 651 So. 2d 1173 (Fla. 1995), the supreme court held that an arbitrator has no authority to award attorney's fees absent an express waiver of the limitation contained in section 682.11, Florida Statutes (1993). The court stated:

> As the Fourth District points out, "Under the current policy of broad construction in favor of arbitration, such a narrow and restrictive reading [of section 682.11] is certainly questionable."

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[1] Section 682.11, Florida Statutes (1993) provides:

> Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' and umpires' expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award. (Emphasis added).

> Arbitration itself, of course, is a voluntary alternative method for the resolution of disputes. Absent a clear directive from the legislature, we see no reason why the parties may not also voluntarily agree to allow the collateral issue of attorney's fee to be decided in the same forum as the main dispute. We do not read section 682.11 as such a clear directive.

Turnberry, 651 So. 2d at 1175 (citation and footnote omitted).

Appellees argue that the parties agreed to submit the issue of attorney's fees to the arbitrators by their actions. They point out that both parties sought attorney's fees in their claims and counterclaim and that by their execution of the NASD submission agreement, they agreed that "all controversies or disputes between us of any kind shall be settled by arbitration." While we find appellees' argument persuasive, we conclude that the supreme court has expressly limited its holding that the parties may voluntarily agree to submit an attorney's fees issue to an arbitration panel to an express agreement:

> Notwithstanding our ruling today, we will continue to permit trial courts, in the event a dispute arises, to enjoy exclusive jurisdiction to resolve the factual issue of whether the parties have waived their statutory right to have the court decide the fee issue. Under section 682.11, as previously construed by this Court, the parties continue to have the right to have the issue of

> attorney's fees decided in court if they wish. The arbitrator has no authority to award fees absent an express waiver of this statutory right.

Id. at 1175. Based on *Turnberry*, we must hold that the parties' actions did not constitute an express waiver of their right to have the court decide the issue of attorney's fees.

We also reverse the attorney's fees awarded for Jeffrey M. Weissman. The Florida Rules of Professional Conduct provide that "[n]o lawyer or firm may participate in [a contingent attorney's] fee without the consent of the client in writing." R. Regulating Fla. Bar 4-1.5(f)(2). Here, Weissman had no signed retainer agreement or contract with the Johnsons and, consequently, the trial court erred when it awarded attorney's fees for his services. See *Perez v. George, Hartz, Lundeen, Flagg & Fulmer*, 662 So. 2d 361, 362 (Fla. 3d DCA), *rev. denied*, 666 So. 2d 143 (Fla. 1995).

Finally, we hold that appellant has not demonstrated reversible error in the amount of attorney's fees awarded for Mark Tepper or in the award of attorney's fees for post-arbitration representation. See *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993).

Accordingly, we reverse the trial court's confirmation of the arbitrator's award of attorney's fees, with leave to the trial court to

reinstate the amount of its award of attorney's fees for Mark Tepper, upon a determination of appellees' entitlement to such fees. We remand this cause to the trial court for further proceedings consistent herewith.

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

STONE, C.J., and SHAHOOD, J., concur.

IN THE
SUPREME COURT OF FLORIDA

No. 91,539

HOWARD P. JOHNSON, et al.,

Petitioners,

v.

D. H. BLAIR & CO., INC.,

Respondent.

December 24, 1997

ORDER ACCEPTING JURISDICTION &
DISPENSING WITH ORAL ARGUMENT

The Court has accepted jurisdiction and dispensed with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Petitioner's brief on the merits shall be served on or before January 19, 1998; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs.

Please send to the Court, either in Word Perfect format or ASCII text format, a 3-1/2" diskette of the briefs filed in this case. This procedure is voluntary. PLEASE LABEL ENVELOPE TO AVOID ERASURE.

The Clerk of the District Court of Appeal, Fourth District, shall file the original record on or before February 23, 1998.

KOGAN, C.J., SHAW, HARDING and ANSTEAD , JJ., concur

OVERTON and WELLS, JJ., and GRIMES, Senior Justice, dissent.

A True Copy.

Test: "s/Sid J. White" Clerk, Supreme Court

Supreme Court of the State of Florida, Sat Cito Si Recte

IN THE
SUPREME COURT OF FLORIDA

No. 91,539

HOWARD P. JOHNSON, et al.,

Petitioners,

v.

D. H. BLAIR & CO., INC.,

Respondent.

November 16, 1998

ORDER

On December 24, 1997, this Court entered its Order accepting jurisdiction and dispensing with oral argument. We have not determined that the Court is without jurisdiction and, therefore, the Petition for Review is discharged as improvidently granted.

No Motion for Rehearing will be entertained by the Court.

Petitioners' Motion for Attorney's Fees is denied.

HARDING, C.J., and OVERTON, SHAW, KOGAN, WELLS, ANSTEAD and PARIENTE, JJ., concur.

A True Copy.

Test: "s/Sid J. White" Clerk, Supreme Court

Supreme Court of the State of Florida, Sat Cito Si Recte

IN THE
CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

No. 95-04080 CACE (04)

HOWARD P. JOHNSON and IRIS JOHNSON, TRUSTEES,

Petitioners,

v.

D.H. BLAIR & CO., INC., and NAFTALI FEIGENBAUM,

Respondents.

August 25, 1995

FINAL JUDGMENT CONFIRMING
ARBITRATION AWARD

This cause came before the Court on August 9 and 11, 1995, on the motion of Respondent D.H. Blair & Co., Inc. ("Blair"), to vacate the Arbitration Award rendered February 21, 1995 (the Arbitration Award") of the National Association of Securities Dealers, Inc. ("NASD"), and the motion of Petitioners Howard P. Johnson and Iris Johnson, Trustees ("Johnson"), to confirm the NASD Arbitration Award, and the Court having considered the record and the argument of counsel and being otherwise fully advised, it is hereby

ORDERED AND ADJUDGED:

Blair's motion to vacate the NASD Arbitration Award is denied.

Johnson's motion to confirm the NASD Arbitration Award is granted.

The NASD Arbitration Award is confirmed in all respects.

With respect to the claims of Petitioners Howard P. Johnson and Iris Johnson, Trustees, against Respondents D.H. Blair & Co., Inc., and Naftali Feigenbaum, Petitioners Howard P. Johnson and Iris Johnson, Trustees, shall recover from Respondents D.H. Blair & Co., Inc., and Naftali Feigenbaum, jointly and severally, for violation of Section 517.301 of the Florida Statutes, the sum of $32,278.83, plus the sum of $830.00 in NASD forum fees, thereby making a total of **$33,108.83**, which shall bear interest at the legal rate of 8% per year from February 21, 1995, for all of which let execution issue forthwith.

With respect to the claims of Respondent D.H. Blair & Co., Inc., against Petitioners Howard P. Johnson and Iris Johnson, Trustees, the claims of Respondent D.H. Blair & Co., Inc., are dismissed with prejudice, and Respondent D.H. Blair & Co., Inc., shall go hence without day.

With respect to the claims of Respondent D.H. Blair & Co., Inc.,

against Cross-respondent Naftali Feigenbaum, the claims of Respondent D.H. Blair & Co., Inc., are dismissed with prejudice, and Respondent D.H. Blair & Co., Inc., shall go hence without day.

With respect to the claims of Petitioners Howard P. Johnson and Iris Johnson, Trustees, against Respondent D.H. Blair & Co., Inc., for an award of attorney's fees and costs, Petitioners Howard P. Johnson and Iris Johnson, Trustees, shall recover from Respondents D.H. Blair & Co., Inc., their reasonable attorney's fees and costs, pursuant to the arbitration award the specific amount of which will be determined in subsequent proceedings. The Court reserves jurisdiction to determine the amount of said attorney's fees and costs and to determine Petitioners' entitlement to fees and costs incurred since the date of the award and the amount of such fees and costs.

DONE AND ORDERED at Broward County, Florida.

"s/Patricia W. Cocalis"

Circuit Court Judge

Copies furnished by mail to: Mark A. Tepper, Esq., Jeffrey M. Weissman, Esq., Jeffrey Gilbert, Esq.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH DISTRICT

Nos. 95-03368, 96-00290

D. H. BLAIR & CO., INC.

Appellant (s),

vs

HOWARD P. JOHNSON, et al.

Appellee (s).

August 27, 1997

ORDER

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed August 6, 1997, for rehearing is hereby denied; further,

ORDERED that appellees' motion filed August 6, 1997, for rehearing or clarification and for rehearing en banc is hereby denied.

I hereby certify the forgoing is a true copy of the original court order.

"s/Marilyn Beutternmuller"

Clerk

cc: Jeffrey Gilbert, Elliot H. Scherker, Mark A. Tepper, Jeffrey M. Weissman, Naftalie Feigenbaum